In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1532

PETER CARBONE,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent

MOTION IN OPPOSITION TO THE PETITION FOR GRANT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. STATEMENT OF THE CASE

The procedures by which this case has progressed through the state courts has been stated in the petitioners' briefs and need not be repeated here. The state does, however, feel it may be helpful to stress some of the facts relied upon by the Connecticut courts in the determinations of the three issues sought to be considered by this court. References, where necessary, will be made to the appendix affixed to petitioner James Carbone's brief.

The first issue concerns the admissibility of a piece of paper which was obtained in the course of a search of the Carbones' business premises. The facts as found by the trial court and relied upon by the Connecticut Supreme Court appear in that court's second opinion, (52-60a), and need not be repeated at length here. Suffice it to say that on September 2, 1971, the Bridgeport Police Department obtained a warrant to search the premises of Fairfield Scrap, a business enterprise owned by petitioner James Carbone and which employed James' brother Peter and son Frank. (52a, 53a). The warrant was premised on information provided by Albert Edwards and Russell Scofield, two employees of the Carpenter Technology Corporation of Bridgeport, Connecticut, who had admitted stealing precious metals from their employer and delivering them to Fairfield Scrap. (52a, 55a). The thefts had occurred on four different dates between January 8, 1971, and February 20, 1971. (54a, 55a). The items expressly mentioned in the warrant were three kinds of metal, a "braided cable chain with [a] bull ring and L hooks for lifting inserts," a heavy link chain with an oval bull ring, and a certain tarpaulin canvas. (58a). Books and papers were not mentioned.

The party which executed the search warrant consisted of a Bridgeport police detective, two employees of Carpenter, who presumably could identify items stolen from Carpenter, one Alfred Constantino, an insurance investigator, a photographer from the Bridgeport Police Department, two members of the Fairfield, Connecticut Police Department, and an F.B.I. agent. (52a-53a).

Cafferty had been informed by the thieves that the name "John Parks" had been used on a receipt slip for one of the deliveries of stolen items. (52a). On the way to the premises of Fairfield Scrap, Cafferty informed Constantino that he couldn't search for sales slips unless voluntary consent was obtained. (56a).

On arrival at Fairfield Scrap, one of the Fairfield policemen found Peter Carbone and read to him from the warrant the items listed therein. (53a). James Carbone arrived shortly thereafter, the warrant was shown to him, and he was informed that questions should be addressed to Cafferty. (53a). Peter and James Carbone were given *Miranda* warnings. (54a).

Abount an hour after the search began, Constantino, the insurance investigator, asked Frank Carbone if he could look at the sales slips. Frank relayed the request to James, who said, "Well, I see no reason why he shouldn't see them. Fine, let him have them." (56a). Constantino and another went through the receipts and found the "John Parks" slip. (56a). Frank and James assisted in making a photostatic copy of the slip and signed a receipt for it. (56a). The slip was subsequently the subject of a motion to suppress, which was denied, and was admitted into evidence at the trial.

The Connecticut courts held that the warrant was not de-

fective because of staleness and that the consent to search for the slips was valid. (57a). The items useful in handling metal, the two chains and the tarpaulin, were thought to be innocuous in themselves and it was held to be reasonably probable that they, at least, would be on the premises. (58a-59a). The consent was held valid, as the consenters were adult businessmen who had been given their rights and who not only voluntarily gave permission for the search but to some extent assisted in it. (60a). No sort of coercion or deviousness has been found. The facts actually found and relied on by the Connecticut courts hardly support the Kafkaesque reign of terror presented by the petitioners.

A second issue concerns alleged duplicity in the information. The substituted information (App. to this brief pp. 1a-4a) consisted of four detailed counts, one for each delivery of items stolen from Carpenter. In each count, the items were described in detail. With respect to the first two counts, the petitioner's conduct was described as "being present when the stolen property was unloaded . . . [and] by arranging for and being present when the payments for the material were made." (App. to this brief pp. 1a-2a). As to the third count, the state alleged that the petitioner was present at the delivery, spoke with Scofield and Edwards, and arranged for the payment. (App. to this brief p. 3a). In the fourth count, the state alleged that the petitioner arranged for the larceny, was present at the delivery, and participated in the payment. (App. to this brief pp. 3a-4a).

Additionally, the state filed three bills of particulars. (App. to this brief pp. 4a-8a). From an examination of the information and the bills of particulars, it is obvious that the state

claimed that the petitioner was both an accessory to the actual larceny, in that he arranged for the thefts, and a receiver of stolen goods. There was no ambiguity in the factual pattern alleged. The legal analysis will appear in the argument section of this brief.

The third claim is that the petitioner's Sixth Amendment right of confrontation was violated by a limitation of the cross-examinatinon of Scofield and Edwards. Prior to the criminal trial of the petitioner, Carpenter had instituted a civil action against the Carbones, Scofield and Edwards. (68a). In the course of this proceeding, both Scofield and Edwards were deposed; each at that time invoked his privilege against self-incrimination on the advice of his attorney. (10a-12a). Prior to the depositions, each had given detailed statements to the police, again on the advice of attorneys, and Scofield had pleaded guilty to two charges, (10a-12a), but had not yet been sentenced. At the time he invoked the privilege, Edwards did not know whether or not he would testify for the state. (11a). Each stressed that the privileges had been invoked on the advice of his attorney. (11a-12a).

The petitioner's position was that he should have been allowed to cross-examine Scofield and Edwards on the issue of the invocation of the Fifth Amendment; the essential claim was that because they had been willing to give information to the police but not to the petitioner, bias against the petitioner was demonstrated; and that evidence of the bias should have been before the jury. (12a). He also claimed that the privilege had been invoked in bad faith because it had been waived by virtue of the statements given to the police; the invocations, then, supposedly constituted further evidence of bias and prejudice against the petitioner. (12a).

Significantly, there was no invocation of the privilege at the criminal trial of the petitioner and no claim has been made that any prior statements were not available for purposes of cross-examination. The petitioner was undoubtedly aware of the witnesses' cooperation with the police, of their statements which incriminated the Carbones, and of the pendency of criminal cases against them. The trial court excluded the offer of proof concerning the invocation on grounds of relevancy, and the Connecticut Supreme Court upheld the exclusion. (68a-69a).

II. *REASONS FOR DENYING CERTIORARI*

A. THE "JOHN PARKS" SLIP WAS PROPERLY ADMITTED, AS IT HAD BEEN OBTAINED IN FULL COMPLIANCE WITH THE FOURTH AMENDMENT.

The petitioner's claim with respect to the admissibility of the John Parks slip is essentially two-fold: the warrant is claimed to have been stale and the consent to look through the receipts is claimed to have been involuntary. It is the state's position that both claims involve factual rather than legal disputes and that the Connecticut courts have applied the appropriate standards to the facts found.

The staleness issue was determined with reference to the landmark case in the area, *Sgro v. United States,* 287 U.S. 206 (1932). The Connecticut courts fully recognized that the question whether there is probable cause to believe that the items to be searched for are on the premises at the time the warrant is issued is one of constitutional dimension. (58a). With respect to the staleness issue, it has been recognized by this court that the circumstances of each case determine whether probable cause exists. *Sgro. v. United States*, supra, 210-11. Citing a

recent case, *United States v. Steeves,* 525 F.2d 33, 38 (8th Cir. 1975), the Supreme Court of Connecticut determined that the trial court had not abused its discretion in finding that the innocuous articles were, within a reasonable probability, likely to be on the premises. (58a-59a). Because, as noted above, there was a factual basis for the conclusion and because the state courts have applied the tests prescribed by this and other federal courts, there would seem to be no reason for this court to review the issue.

The petitioner has commented on an "about-face" by the Connecticut Supreme Court on the staleness issue. While the propriety of issuing a substitute opinion doesn't appear to be a matter of concern to this court, it is obvious that the two opinions are easily reconcilable. The first opinion held, essentially, that the staleness issue had not been properly considered and remanded the case for further proceedings. (42a). The trial court then considered the staleness issue and wrote a thorough memorandum stating the facts found and the law applied; the conclusion was that the warrant was not stale. (43a et seq.). On the second appeal to the Connecticut Supreme Court, that court held that, having now considered all the attendant circumstances, the trial court had not erred. (58a-59a). It is the petitioner's characterization of the proceedings, rather than the proceedings themselves, which are unusual.

The related issue is whether the consent to the search was voluntary. As noted above, receipt slips were not mentioned in the warrant; rather, in the course of the search permission was sought and granted to look through the receipts. The petitioner's claim is that the consent was not voluntary but rather was mere acquiescence to a claim of lawful authority. See

Bumper v. North Carolina, 391 U.S. 543 (1968).

This issue was considered exhaustively by both the trial court and the Supreme Court. *Bumper* was distinguished for factual reasons stated above; various factors such as the reading and showing of total willingness to the point of cooperation by the Carbones, the giving of *Miranda* rights, and the fact that the Carbones were adult businessmen were considered. (60a). Applying the standards of *Schneckloth v. Bustamonte,* 413 U.S. 218, 227 (1974), the state courts concluded that the state had met its burden to show voluntary consent by the totality of he circumstances. With respect to the Fourth Amendment issue, then, the state submits that no new or unusual principles of law were applied; rather, the constitutional standards enunciated by this court were strictly followed. The factual version urged by the petitioners was not accepted by the state courts, but there appears to be almost no dispute as to the applicable law.

B. *THE INFORMATION WAS NOT HARMFULLY DUPLICITOUS.*

As noted above, the information in combination with the bills of particulars alleged larceny violations both as principal and as receiver; only §53-63a of the Connecticut General Statutes was alleged to have been violated. The court denied defense motions to dismiss and to force the state to elect to proceed under one theory or the other. The Connecticut Supreme Court stated, in essence, that the state should have expressly indicated that it would attempt to prove both, but that the state had implicitly indicated this intention and that defense counsel undoubtedly understood the situation and was not misled. (65a-66a).

The reason why the state preceeded as it did lies in the statutory and case law applicable at the time of trial. Section 53-63a of the Connecticut General Statutes (79a) was the general larceny statute and §53-65 provided that a receiver of stolen goods "shall be prosecuted and punished as a principal . . ." (79a). Under the case law, neither offense was considered to be a lesser included offense of the other. But, under the case law, one could be charged under §53-63a and be convicted as a receiver, because receiving was considered to be one way generally to commit larceny and because the language of §53-65 expressly provided for prosecution as a principal. Any ambiguity could be resolved by a bill of particulars. But one charged only with a violation of §53-65 could not be convicted on proof that he was a principal. *State v. Huot*, 170 Conn. 463 (1976); *State v. Palkimas*, 153 Conn. 555 (1966). To protect itself, then, the state charged only a violation of §53-63a, but, through a detailed information and several bills of particulars, apprised the petitioner that he was accused of being both an accessory, and thus liable under the principal statute, and a receiver. The petitioner was quite clearly given adequate notice of the crimes of which he was accused; and, under Connecticut law, principles of double jeopardy foreclosed subsequent prosecution under either theory. See *State v. Cofone*, 164 Conn. 162, 167-68 (1972).

The decision of the Connecticut Supreme Court is in conformity wtih decisions of this court. *Russell v. United States*, 369 U.S. 749 (1962), held, generally, that an indictment must particularly charge a crime. An information and bill of particulars, of course, serve the same purpose as an indictment: each must apprise the accused of what he must be prepared to meet and must be sufficiently accurate for double jeopardy purposes.

Russell v. United States, supra at 369 U.S. 763-64. The vice in *Russell* was that the claimed offense was not stated with sufficient particularity and, because the charging instrument was an indictment, the omission could not be cured by a bill of particulars. In the present case, as noted above, the information and bill of particulars were minutely detailed.

Further, in the instant case, the court clearly charged the jury that it could return one of three verdicts on each count: larceny (as an accessory), receiving, or not guilty. (24a-26a). Any contention that the petitioner does not know of what crime he is convicted, and thereby is subject to the unfairness and uncertainty in *Russell v. United States,* supra, and *United States v. Starks,* 515 F.2d 112, 116-18 (3d Cir. 1975), must fall. The Connecticut Supreme Court's determination that there was no duplicity harmful to the petitioner is in full compliance with decisions of this court.

C. THE COURT'S EXCLUSION OF EVIDENCE THAT SCOFIELD AND EDWARDS HAD TAKEN THE FIFTH AMENDMENT IS CONSISTENT WITH DECISIONS OF THIS COURT.

The facts underlying the final reason urged for granting certiorari were presented above. The petitioner in his brief argues that the privilege was improperly invoked, as the witnesses had waived the privilege. But whether the invocation was proper is not an issue in this case; here, the only issue is whether the trial court abused its discretion in excluding evidence to the effect that the witness had in a prior civil proceeding invoked the Fifth Amendment.

The Connecticut Supreme Court relied on *Grunewald v. United States*, 353 U.S. 391 (1957) in upholding the trial court. (68a-69a). *Grunewald* recognized (at 353 U.S. 421-24) that many factors may motivate the invocation, and, in view of the disfavor in which many people hold the Fifth Amendment, undue prejudice may well outweight the minimal relevance of the evidence.

Here, as in *Grunewald*, it is difficult to imagine how evidence that the witnesses had "taken" the Fifth Amendment would affect their credibility. The privilege was invoked on the advice of attorneys; they both were still subject to criminal sanctions. The invocation was surely not inconsistent with their trial testimony.

There also is no inconsistency between the Connecticut Supreme Court's ruling and this court's opinion in *Davis v. Alaska*, 415 U.S. 308 (1974). In *Davis*, a witness was in effect allowed to lie with impunity because of a state policy prohibiting disclosure of juvenile records. Here, the witnesses' credibility was subject to attack from many avenues, including their own involvement and their own criminal cases. It is patently speculative whether the invocation in any event evinced bias, as it may well have been motivated by other valid considerations, and the evidence may well have been prejudicial. *Davis* concerns denial of cross-examination rather than reasonable limitation.

III. *CONCLUSION*

The state respectfully requests that certiorari be denied.

THE STATE OF CONNECTICUT

BY .....

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BY .....

ROBERT E. BEACH, JR.
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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the within and foregoing Motion in Opposition to the Petition for Grant of Certiorari have been mailed to Jacob D. Zeldes, Esquire, 333 State Street, P.O. Box 1740, Bridgeport, Connecticut 06601 this 25th day of May, 1977.

.....

JOSEPH T. GORMLEY, JR., ESQ.

.....

ROBERT E. BEACH, JR., ESQ.

CERTIFICATION OF SERVICE

This is to certify that three (3) copies of the within and foregoing Motion in Opposition to the Petition for Grant of Certiorari have been mailed to Ira B. Grudberg, Esquire, 300 Orange Street, New Haven, Connecticut 06503, this 25th day of May, 1977.

.....

JOSEPH T. GORMLEY, JR., ESQ.

.....

ROBERT E. BEACH, JR., ESQ.

INDEX TO APPENDIX

No. 20735.

Substituted Information

Joseph T. Gormley, Jr., State's Attorney for Fairfield County, accuses Peter Carbone then of Trumbull of the crime of

First Count

Larceny and charges that on or about the 8th day of January, 1971 at Fairfield in said County, the said Peter Carbone did commit larceny on the personal property of Carpenter Technology Corporation, Inc. valued in excess of Two Thousand ($2,000) Dollars in violation of Sec. 53-63 a of the Connecticut General Stautes. Said larceny is more particularly describe as follows; 2 copper inserts with an approximate total weight of 8000 pounds with a value of forty-nine (49) cents per pound were taken from Carpenter Technology between 6:30 P.M. January 8, 1971 and 9:11 A.M. on January 9, 1971 by two employees of Carpenter Technology and delivered to the Fairfield Scrap Iron and Metal Company, 158 State Street Ext. in Fairfield. The value of the 2 copper inserts was approximately Three Thousand Nine Hundred Twenty ($3,920.) Dollars. The defendant's participation consisted in general of conversations and arrangements to buy the stolen merchandise prior to the thefts, by indicating the types of materials to be taken, by arranging for the amount to be paid for the stolen merchandise and by being present at or during the time of delivery.

Second Count

And Said State's Attorney Further Charges That on or about the 24th day of January, 1971 at Fairfield in said County, the said Peter Carbone did commit larceny of the personal property

of Carpenter Technology Corporation, Inc. valued in excess of Two Thousand ($2,000.) Dollars in violation of Section 53-63a of the Connecticut General Statutes. Said larceny is more particularly described as follows, 5 copper inserts with a total weight of a least Ten Thousand pounds with a value of Forty-nine (49) cents per pound were taken from Carpenter Technology between 7:10 A.M. January 23, 1971 and sometime on January 25, 1971 by two employees of Carpenter Technology and delivered to Fairfield Scrap Iron and Metal Company, 158 State Street Ext., Fairfield. The value of the 5 copper inserts was approximately Four Thousand Nine Hundred ($4,900) Dollars. The defendant's conduct consisted generally of conversations and arrangements to buy the stolen merchandise prior to the theft, by helping to unload the stolen merchandise, by arranging for the amounts to be paid for the stolen merchandise, and by being present during the delivery of the stolen merchandise.

And Said State's Attorney Further Charges that on or about the 11th day of February, 1971, at Fairfield in said County the said Peter Carbone did commit larceny of the personal property of Carpenter Technology Corporation, Inc. valued in excess of Two Thousand ($2000) Dollars in violation of Sec. 53-63a of the Connecticut General Statutes. Said larceny is more particularly described as follows: 3 pallets of Hanna Nickel weighing approximately Four Thousand (4,000) pounds each with a value of approximately Sixty-six (66) cents per pound and one pallet of INCO Nickel Cathodes weighing approximately four thousand pounds with an approximate value of $1.34 per pound were taken from Carpenter Technology between 1:25 P.M. February 10 and 7:29 A.M. on February 11 by two em-

ployees of Carpenter Steel and delivered to Fairfield Scrap Iron and Metal Company, 158 State Street Ext. in Fairfield. The approximate value of the Hanna nickel was Seven Thousand NineHundred Twenty ($7,920) Dollars and the INCO Nickel Cathodes, Five Thousand Three Hundred Seventy-Six ($5,376) Dollars. The defendnat's conduct consisted generally of conversations and arrangements to buy the stolen merchandise prior to the theft, by helping to unload the stolen merchandise, by arranging for the amounts to be paid for the stolen merchandise, and by being present during the delivery of the stolen merchandise.

Fourth Count

And Said State's Attorney Further Charges that on or about the 20th day of February, 1971 at Fairfield in said County the said Peter Carbone did commit larceny of the personal property of Carpenter Technology Corporation, Inc. valued in excess of Two Thousand ($2,000) Dollars in violation of Sec. 53-63a of the Connecticut General Statutes. Said larceny is more particularly described as follows: 12 pallets of INCO Nickel Cathodes weighing approximately 4000 pounds each with a value of approximately $1.34 per pound were taken from Carpenter Technology, Inc. between 5:00 P.M. on February 19, 1971 and sometime on February 20, 1971 by two employees of Carpenter Technology and delivered to Fairfield Scrap Iron and Metal Company, 158 State Street Ext., Fairfield. The approximate value of the INCO Nickel Cathodes was $64,304. The defendant's conduct consisted generally of conversations and arrangements to buy the stolen merchandise prior to the theft, by helping to unload the stolen merchandise, by arranging for

the amounts to be paid for the stolen merchandise, and by being present during the delivery of the stolen merchandise.

Dated at Bridgeport, Connecticut, this 18th day of May, 1972.

JOSEPH T. GORMLEY, JR.,
State's Attorney in and for Fairfield County.

Filed May 18, 1972.

No. 20735.

In Reply to Motion for Bill of Particulars

2., 3., 4. & 5. The defendant Peter Carbone advised Russell Scofield and Albert Edwards which metals should be taken from Carpenter Technology, helped unload the materials taken from Carpenter Technology at his business at Fairfield Scrap Iron & Metal Co., and participated with his brother James in making payments to Russell Scofield and Albert Edwards for the stolen merchandise. The materials were also stolen from Carpenter Technology and delivered at Fairfield Scrap Iron & Metal Co., 158 State Street Extension on dates between January 8, 1971 and February 20, 1971. Approximately four deliveries were made during this period on or about January 8, January 24, February 11 and February 20, 1971.

6.	Seven copper inserts (.49 per pound)	$10,976.00
	Hanna Nickel 3 pallets at 4000 pounds at .66 per pound	7,920.00

Electrolyte Nickel Cathodes 13 pallets at 4000 pounds per pallet at $1.34 per pound	69,680.00
	$88,576.00

This represents the approximate total value of property taken and the value thereof during the period January 8, 1971 through February 20, 1971.

The copper inserts were taken in January, the Hanna Nickel and one pallet of Inco Nickel on or about February 11, 1971 and 12 pallets of Inco Nickel on or about February 20, 1971.

STATE OF CONNECTICUT,
By JOSEPH T. GORMLEY, JR.,
State's Attorney.

Filed November 18, 1971.

Supplemental Bill of Particulars

2a. On more than one occasion prior to the first theft at Carpenter Technology on January 8, 1971 the defendant, Peter Carbone, while on the property of Carpenter Technology, advised Edwards and Scofield what metals were of what value and which metals should be taken. The exact times and dates of these occurrences are unknown, but did occur shortly before January 8, 1971.

STATE OF CONNECTICUT,
By JOSEPH T. GORMLEY, JR.,
State's Attorney,

Filed December 23, 1971.

No. 20,735

STATE OF CONNECTICUT,	)	Superior Court,
vs.	)	Fairfield County,
PETER CARBONE.	)	May 17, 1972.

Amended Bill of Particulars

1. The Supplemental Bill of Particulars dated December 22, 1971 is amended by deleting the words, "while on the property of Carpenter Technology."

2. Paragraphs 6 and 7 of the Reply to Motion for Bil of Particulars dated April 19, 1972 as to the First Count is amended to read: January 8, 1971, 2 copper inserts approximately $3,920.00 and as to the Second Count: January 24, 1971, 5 copper inserts approximately $4,900.00.

STATE OF CONNECTICUT,
By JOSEPH T. GORMLEY, JR.,
State's Attorney.

Filed May 17, 1972.